Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
1998 Biennial Regulatory Review --	)	WT Docket No. 98-182
47 C.F.R. Part 90 - Private Land Mobile	)	RM-9222
Radio Services	)	
	)	
Replacement of Part 90 by Part 88 to Revise	)	PR Docket No. 92-235
the Private Land Mobile Radio Services and	)	
Modify the Policies Governing Them	)	
and	)	
Examination of Exclusivity and Frequency	)	
Assignment Policies of the Private Land	)	
Mobile Services	)	

To: The Commission

Comments of the Ad Hoc 800/900 MHz Licensees' Committee

The Ad Hoc 800/900 MHz Licensees' Committee ("Committee"), by its attorneys and pursuant to Section 1.415 of the Rules, hereby submits its Comments in response to the Commission's Notice of Proposed Rulemaking, FCC 98-251, released October 20, 1998 in the captioned proceeding ("*NPRM*"). The Committee is composed of SMR operators and licensees of 800 and 900 MHz Business and/or Industrial Land Transportation ("B/ILT") Service licenses (sometimes referred to as the "Pool Channels").[1] The Committee participated by Comments and Reply Comments in the *Nextel Waiver Request* proceeding intiated by the Commission's

[1]Prior to 1996, so-called "General Category" channels and the Pool Channels were available for licensing to either private, internal-use licensees or to SMR operators. In its *First Report and Order, Eighth Report and Order, and Further Notice of Proposed Rule Making*, 11 FCC Rcd. 1463 (1995) ("*First Report and Order*"), the Commission allocated the former General Category channels to SMR usage, and the Pool Channels to B/ILT usage, and prohibited intercategory sharing. *See* "Background" discussion, *infra.*

decision, DA 98-2206, released October 28, 1998. In that proceeding, Nextel requested and the Committee supported the Commission allowing more flexibility to *incumbent* 800/900 B/ILT licensees in the use of their spectrum by means of either a declaratory ruling or general waiver to allow such incumbents or their assignees to convert such pre-existing, incumbent operations to SMR usage to meet evolving communications needs.

In the *Nextel Waiver Request* proceeding, certain commenters argued that the relief sought by Nextel and the Committee could appropriately be granted by the Commission only via a rulemaking proceeding. The Committee disagreed therein with such commenters. (The Commission has discretion to proceed by means of rulemaking, waiver, declaratory ruling, or even adjudication in making policy, so long as all interested parties are afforded notice and an opportunity to make their positions known in advance.) Given that, for the reasons set forth in the various comments filed in the *Nextel Waiver Request* proceeding, the public interest requires giving incumbent 800/900 MHz B/ILT licensees such flexibility, if the Commission desires to use rulemaking rather than another method to assist the public interest, then this biennial review rulemaking presents a perfect opportunity to do so.[2]

Some of the SMR operators in the Committee have purchased additional SMR spectrum at auction from the FCC, but still have insufficient SMR spectrum for their business needs, either because they still have to relocate incumbent licensees or because current operations provide insufficient trunking efficiencies. Each of the B/ILT licensee members is currently hamstrung from

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[2]If the Commission thought it necessary or appropriate (and if doing so would expedite a decision rather than slow down the process), the Commission can consolidate this *NPRM* with the *Nextel Waiver Request* proceeding, and rely on the record compiled therein for any beneficial rules the Commission may adopt herein.

flexibly finding an appropriate solution to its evolving communications needs. Each Member of the Committee has been injured and continues to sustain injury from the Commission's imposition and maintenance of the freeze on intercategory sharing of these channels by SMRs, and each would benefit from a limited relaxation or lifting of this prohibition with respect to incumbent licenses. As the Committee explained in its filings in the *Nextel Waiver Request* proceeding, both hisorical and current factors militate in favor of establishing a policy in favor of flexibility for incumbents.

BACKGROUND

On April 5, 1995, without warning, the Commission imposed an immediate freeze upon SMR applications for the so-called Pool Channels. *See Inter-Category Sharing of Private Mobile Radio Frequencies in the 806-821/851-866 MHz Bands*, 10 FCC Rcd. 7350 (1995) ("*Freeze Order*"). Although the stated rationale for the *Freeze Order* was to preserve as-yet-unlicensed spectrum for "future radio spectrum needs", 10 FCC Rcd. at 7352, as implemented, the freeze also applied to applications for assignment of pre-existing PMRS (*i.e.*, B/ILT) stations to SMR assignees, and to applications by existing licensees to have their stations reclassified as "SMR" without assigning them. This freeze played havoc with private contractual arrangements between SMRs and existing non-SMR B/ILT Pool Channel licensees that may have wished to trade their Pool Channel spectrum for the right to operate as customers on wide-area SMR spectrum.

Prior to the Commission's April 1995 *Freeze Order*, SMR applicants were permitted to apply for unused B/ILT channels when no SMR channels were available in the area, or to take assignments of incumbent B/ILT channels. Pursuant to that intercategory sharing authority, numerous commercial operators applied for and were assigned B/ILT channels for use in commercial systems. In fact, a review of the Commission's licensing database reveals that fifty percent of <u>all</u> Business

channels are currently licensed for use in commercial systems while nearly eighty percent of all Industrial/Land Transportation channels currently are licensed for commercial operation.

When the Commission issued its *First Report and Order, supra*, this freeze became embedded in the rules. The Commission's stated rationale for making the Pool Channel spectrum off-limits to commercial use was the Commission's concern "that continuing to allow SMR applications for the Pool Channels could cause a scarcity of frequencies for PMRS uses." *Id.*, 11 FCC Rcd. at 1537. Patently, where an **existing** non-SMR incumbent licensee decides to trade its Pool Channel license in return for use (as a customer) of SMR spectrum (perhaps including the same frequencies being traded to the SMR operator, which could then be trunked with other SMR channels for greater efficiency), the involved Pool Channels are **not** being "lost" to "PMRS uses." Similarly, where an incumbent B/ILT licensee decides to sell excess capacity for a profit and seeks reclassification as "SMR" to accomplish such sale of excess capacity, the involved Pool Channels are **not** being "lost" to "PMRS use."

Nevertheless, perhaps for administrative convenience, as worded and implemented, the revised Rule Sections 90.617 and 90.619 adopted in the *First Report and Order* precluded not only new SMR applications for unlicensed Pool Channel spectrum, but also applications for voluntary SMR assignment or SMR reclassification of pre-existing Pool Channel stations.

The Committee is not seeking to allow SMRs to apply for unused Pool Channel spectrum, but is only seeking very limited relief to allow the voluntary reclassification of incumbent spectrum to SMR use. (No change is sought respecting Public Safety spectrum.) Thus, all remaining and as-yet-unlicensed Pool Channel spectrum would remain exclusively available for future non-SMR spectrum needs, and no B/ILT licensee could be forced to give up its spectrum to SMR usage.

DISCUSSION

At this time, and especially with two SMR auctions completed, administrative convenience is not a sufficient justification to prohibit incumbent B/ILT Pool Channel licensees from having the flexibility to make efficient business decisions on the use of their spectrum. The Committee Members have been involved in numerous instances where an incumbent B/ILT Pool Channel licensee has determined that its communications needs are best served by becoming a customer on a wide-area, multi-site SMR system, rather than continuing to rely upon its own single-site station, but where the only way for the incumbent B/ILT licensee to recoup its capital costs for the existing station is to trade it to the SMR operator, who can then integrate the former B/ILT channels into the wide-area SMR system to everyone's benefit. This type of rational solution to the continued problem of spectrum scarcity is currently being frustrated by the prohibition on voluntary assignment/redesignation of pre-existing B/ILT Pool Channel licenses. With the rapidly changing landscape of the wireless industry, licensees who depend on mobile communications systems need increased flexibility to determine how to meet their evolving wireless needs. Each individual licensee is in the best position to make this determination for itself and requires a flexible regulatory environment to do so.

Here, the reason for the rule against inter-category sharing of B/ILT Pool Channels by SMRs is to preserve as-yet-unlicensed Pool Channel spectrum for non-SMR uses, and to maximize the flexibility available to B/ILT licensees, now and in the future. That rule is satisfied by prohibiting SMR applications for new B/ILT spectrum. Any concern that changing policy for incumbents would trigger speculative applications by B/ILT eligibles now alerted to the opportunity to assign such licenses to an SMR operator can be curtailed, by limiting the eligibility for a waiver to

incumbent B/ILT licenses. The Committee suggests that "incumbent" be defined as licenses applied for or issued prior to October 28, 1998 (which is the date the FCC released the *Nextel Waiver Request* Notice). By "applied for or issued," the committee means that the operation of the particular frequency covering the current coverage area must have been applied for or issued to either the current licensee or a predecessor licensee.[3]

To go further than that, and to continue to prohibit voluntary reclassification of incumbent B/ILT Pool Channel stations, does not advance the purpose of the rule, and actually undermines the stated goal of protecting incumbent B/ILT licensees. Therefore, the public interest is best served by the Commission amending Sections 90.617 and 90.619 in the case of all applications for voluntary reclassification of incumbent B/ILT Pool Channel stations.

CONCLUSION

Either through the *Nextel Waiver Request* proceeding or through this *NPRM*, the Commission should act expeditiously to allow incumbent B/ILT Pool Channel licensees to reclassify their stations as SMR or to assign them voluntarily to SMR operators for SMR usage if to do so advances the current communications needs of the existing licensee. The public interest is served by protecting B/ILT licensees, not B/ILT "spectrum." Whether, in any individual case, the licensee is best served by continuing to operate its station as a stand-alone station serving licensee's own units from a single base station, or by trading its license to an SMR operator for inclusion in a wide-area SMR network

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[3]If the Committee's suggestion is not acceptable, then at minimum, "incumbent" should refer to B/ILT licenses applied for or issued prior to the April 5, 1995 release of the *Freeze Order*. And in either event, "applied for or issued" should be measured from when the facility was first sought to be established using the current frequency to cover the current coverage area, not when the current licensee acquired it from some predecessor, because either way, such spectrum is not spectrum that was "unused" at the time the *Freeze Order* was released.

that would include the former licensee's units as customer units (with the traded license perhaps being prepayment for service) is a question best answered by the licensee itself, not by outside organizations that have their own agendas to pursue. Therefore, the Commission should amend Sections 90.617 and 90.619 accordingly.

Respectfully submitted,

The Ad Hoc 800/900 MHz Licensees' Committee

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December 28, 1998
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